

Some parties argue that incumbent LECs are seeking to impose "outrageous" non-recurring charges and fret that these rates will pose a barrier to entry. These parties use this allegation as a pretext to justify adoption of a number of unwarranted assumptions that would have the effect of reducing non-recurring charges below relevant non-recurring TELRIC. For example, although ALTS admits that the Commission's analysis of the distinction between recurring and non-recurring costs is "impeccable," it suggests that the Commission ignore that analysis and adopt rules that set non-recurring rates at levels equivalent to allegedly analogous retail services. ALTS argues that since these retail rates often include more functions than just the network element in question, "there is certainly no unfairness . . ."<sup>39</sup> ALTS goes further and also proposes to set the non-recurring rates at the lowest level charged by any LEC.<sup>40</sup>

However, ALTS fails to present any evidence that existing non-recurring rates for retail services are based upon non-recurring TELRIC costs, or that they in fact cover the non-recurring costs of providing these services. The fact is that in many cases for state policy and other reasons, they do not cover those costs. Further, ALTS fails to provide any evidence, beyond speculation, that the non-recurring costs of providing a network element are the same as some allegedly analogous retail services, or that rates based on the non-recurring costs for retail services would fairly compensate incumbent LECs for their costs. Thus, the ALTS proposal should be rejected.

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<sup>39</sup> ALTS Petition at 3-4.

<sup>40</sup> Id. at 5-6.

Finally, AT&T recommends that the Commission establish a presumption that non-recurring "software" operations charges should be the same amount (\$5.00) that the Commission prescribed for the PIC change.<sup>41</sup> However, here again AT&T fails to present any evidence that the cost of a PIC change bears any relationship to the costs of developing and establishing network elements. Moreover, there is no claim, much less any evidence, that the Commission based PIC charges upon TELRIC. Thus, there is no factual basis for AT&T's proposed assumption and it must be rejected.

The proper way to establish non-recurring charges for network elements is for the incumbent LECs to conduct studies of the costs involved with providing a particular element. As circumstances change, these studies can be updated. If a dispute arises, the parties can litigate the validity of these studies before the state commissions in arbitration. This is in fact exactly what Ameritech has done. The issue of the validity of these studies is now before state regulators and there is no reason for the Commission to usurp the role of the states by prescribing a presumed valid rate.<sup>42</sup>

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<sup>41</sup> Id. at 19.

<sup>42</sup> There is no factual basis for AT&T's specific criticism of Ameritech's proposed charges for physical collocation. Id. at 12. These charges are based on a forward looking cost study and include all engineering, planning, and design costs. The required building modifications include security devices, additions to and distribution of heating, ventilation and air conditioning, AC power circuit, and necessary space modifications. For the initial collocation enclosure of approximately 100 sq. ft., approximately 300 hours are expended by six different Ameritech workgroups for pre-construction activities and order design, in addition to contractor building work. In short, Ameritech is demonstrating to state commission that these costs and the associated charges are fully supported and justified.

**C. There is No Basis for the Adoption of the Hatfield Model**

MCI asks the Commission to reconsider its decision not to adopt MCI's proposed Hatfield Model.<sup>45</sup> In its *First Report and Order*, the Commission correctly found that the various cost models, including the Hatfield Model, had been "submitted too late in this proceeding for the Commission and the parties to evaluate them fully." (¶ 835) For that reason, the Commission wisely deferred the consideration of a generic economic cost model to the first quarter of 1997.

MCI does not address the Commission's concerns about a lack of time to adequately evaluate the model or about practical and empirical problems. Rather, MCI claims in a backhanded way that the Hatfield Model "is the only model on record that fully complies with the definition of TELRIC adopted in the Order."<sup>46</sup> Apparently, what MCI wishes to avoid is the thorough examination of its cost model.

However, simply because Hatfield attempts to estimate the TELRIC costs of network elements does not mean that it accurately does so, or that the practical and empirical problems discovered by the Commission and other parties since its release have been miraculously resolved. In fact, as the Commission recognized, even though the parties have not had an adequate time to analyze the Hatfield study submitted by MCI, they had discovered many problems and anomalies that "result in below-cost rates for services." (¶ 830) Clearly, these concerns need to be fully examined before any cost model is adopted.

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<sup>45</sup> MCI Petition at 2-7, citing the *First Report and Order* at ¶ 835.

<sup>46</sup> MCI Petition at 3.

Ameritech submits that the Commission is correct and that the generic cost models submitted in this proceeding, including the ever-changing Hatfield models, remain untested black boxes that are based on hundreds of unsubstantiated assumptions and produce unreliable and often irrational results.<sup>47</sup>

**D. The Commission Should Reaffirm its Decision Not to Impose an Imputation Rule**

The Commission should also reject the petition of CCTS for reconsideration of the decision not to mandate a national imputation, or "sum of the parts," rule in this proceeding.<sup>48</sup> The Commission fully addressed the reasons why imposing such a rule at the federal level is neither necessary nor beneficial. (§ § 848-880) It recognized that "nothing in the 1996 Act prohibits individual states from adopting imputation rules," and concluded that it would "leave the implementation of such rules to individual states for the time being." (§ 850) This eminently sensible conclusion was fully supported by the evidence in the record

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<sup>47</sup> For example, even based upon Ameritech's partial analysis, it is clear that Ameritech cannot build loops itself, or have them constructed by MCI or anyone else, for the costs that the actual Hatfield model produces. Further, many of the Hatfield model's basic assumptions are wrong. For instance, its average depreciation lives (18 years vs. 9.7) are inconsistent with actual experience. All these faulty assumptions have the effect of understating Ameritech's costs. Moreover, the model's logic is also flawed. For example, it grossly understates the amount of capital required to build a loop, and fails to carry all input changes through all calculations. Further, Hatfield is based upon nearly 400 assumptions, many of which are totally unsupported. For example, it makes the unsupported assumption that 2/3 of trenching costs will be borne by parties other than incumbent LECs. Hatfield's nearly 400 assumptions also make it far too complex and unreliable to be of value to the Commission.

<sup>48</sup> CCTS Petition at 2-3.

and the comments of most parties. (¶¶ 840-847) CCTS has presented no new evidence that would serve as a basis for the Commission to reconsider its decision.

CCTS argues that the Commission should reverse itself and adopt an even more onerous imputation rule than was under consideration in this Docket. Basically, CCTS argues that the combined cost of unbundled network elements should be equal to or lower than the wholesale price for the service offered. This proposed rule is even less defensible than imputation based upon the retail price rule that was rejected in the *First Report and Order*.

The only supporting argument advanced by CCTS is that if such a wholesale imputation rule is not imposed "a CLEC must pay more for unbundled elements than it would to obtain the corresponding resale, it is unlikely to construct a facilities-based network."<sup>49</sup> However, if a resale imputation rule is imposed, it would negate the cost-based unbundled element pricing required by the Act. Ameritech shares CCTS' concern that the Rules unduly favor resellers over facility-based carriers. In fact, CCTS' concern is a mirror image of those expressed by Ameritech in its Comments and Reply Comments addressing the calculation of the discount for wholesale services,<sup>50</sup> and those that underlie Time Warner's PFR. However, the answer is not a national imputation rule. Under § 252(d) of the Act, such a test cannot be used to justify rates for unbundled elements that are below applicable

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<sup>49</sup> Id.

<sup>50</sup> Ameritech fully explained the reasons why the Commission's Rules require establishment of discounts that exceed true avoid costs in its Comments at 79-81 and Reply Comments at 37-42. It will not repeat them here.

costs or discounts on resold services that do not in fact reflect avoided costs. Even where unbundled network elements are priced based upon TELRIC and discounts correctly reflect actual avoided costs, there will be cases where the sum of the unbundled elements will not equal a corresponding wholesale rate. This may occur because the retail rate that is the basis for the wholesale rate is not based upon TELRIC, or because there are added costs in providing the service on an unbundled basis.

The Act intended that the balance between resale and facility-based competition should be governed by efficient economic pricing principles. That is to say: both unbundled elements and discounts on resold services are cost-based, and competitors make their choices based upon rates and discounts that reflect these costs. For this reason, Ameritech believes that Time Warner proposes the only solution consistent with the Act -- correctly pricing the wholesale discount in the first place based upon actual avoided cost, thereby maintaining the balance between resale and facility-based competition envisioned in the Act.<sup>51</sup>

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<sup>51</sup> Time Warner asks the Commission to reconsider its expansion of the "avoided cost" standard for calculating wholesale discounts specified in Section 252(d)(3) into a "reasonably avoided cost" standard. Time Warner properly states that this expansion of the standard resulted in larger resale discount rates than are cost justified. Petition at 3-17. Specifically, Time Warner asserts that the definition of "avoided cost" used by the Commission is too loose and costs which might be or could be avoided but are not erroneously included in the analysis. The effect is to establish discount levels that exceed any cost justification.

Ameritech believes that a strict causal link should be maintained between costs actually avoided and the wholesale discount. In the Ameritech wholesale analysis, the causal link is identified through a TSLRIC analysis which identifies the appropriate product or family avoided cost. These studies, where a dispute arises, are subject to review through the state arbitration process and the state commissions are therefore in the best position to determine the validation of a specific study.

**E. Treatment of Unbundled Element Revenues and Costs for Separations and Accounting Purposes**

NECA asks the Commission to address specific Part 32 (accounting), 36 (separations), and 69 (interstate rate element) issues with respect to unbundled elements. NECA suggests that revenues from unbundled network elements, provided pursuant to agreements, be booked into account 5240 (Rent Revenue) and that interconnection costs should be removed prior to separations by deducting, from pre-separations total costs, an amount equal to unbundled network element revenues.<sup>52</sup>

Ameritech, however, suggests that this proposal results in a distortion because of the inability to correctly match amounts to be deducted with the costs in the pre-separations Part 32 accounts. Instead, Ameritech recommends that the book costs and associated overheads related to unbundled elements be left in the separations process. These costs would remain subject to normal Part 36 rules. Since the costs would not be excluded, there would not be any need to adjust any of the associated unbundled network usage for allocation purposes.

It would be necessary to create subsidiary revenue records in Part 32 to separately identify revenues associated with the "leasing" of unbundled network elements. These separated revenues would then be used in the Part 36 process to reduce or offset the expense, and ultimately the separated revenue requirement, associated with the unbundled elements. This methodology is consistent with current rules and is easily implemented and maintained until the Commission completes access reform and determines the status of separations.

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<sup>52</sup> NECA Petition at 3.

As to the categorization of the costs of the unbundled network elements, loops should be classified as State - Private Line in order to ensure that none of the costs are assigned to the message joint loop category associated with CCLC or subscriber line charge. Costs associated with other elements would be subject to normal Part 36 apportionment.

### **III. The Commission Should Clarify that New LECs are not Entitled to Reciprocal Compensation for Tandem Switching Functions They Do Not Perform**

MFS asks the Commission to "clarify" that the reciprocal compensation (a) "entitles it to compensation for tandem switching on a symmetrical basis so long as its switch serves a geographic area that is comparable to the one served by an incumbent LEC tandem switch," and (b) "does not impose any other requirement."<sup>53</sup> This alleged clarification, if adopted, would turn the Commission's Rules on their head, and permit compensation for tandem switching and transport where they were not performed. MFS' proposal is nothing more than a request for a subsidy from incumbent LECs in violation of the cost-based compensation principles that underpin § 252(d)(3) of the Act and the Commission's Rules. MFS is asking for a "double dip," where it would be compensated twice for the same functions, once as tandem switching and transport and once as local switching and termination. Under MFS' proposal, it would receive a double payment even though it did not provide either tandem switching or transport.<sup>54</sup>

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<sup>53</sup> MFS Petition at 26, referring to 47 C.F.R. § 51.711(a)(3).

<sup>54</sup> In its zeal to receive subsidies, MFS goes further and argues that not only should it be compensated for phantom tandem switching whenever the geographic scope of its local switch is "equivalent" to that of the incumbent LEC tandem, but that in determining the scope of a geographic area  
(continued...)



The Commission should reject MFS' proposal as inconsistent with the clear intent of § 252(d)(2), which provides that state commissions shall "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier's network facilities...." Thus, under the Act, new LECs are entitled to receive compensation for tandem switching and transport functions only when they actually perform those functions, and incur the associated costs, even if the functions are not performed identically to the manner in which the interconnected incumbent LEC performs them. But when all that is being provided is local switching and local termination of calls to its own end users, the new LEC is only entitled to receive compensation for that function.

Sprint correctly explains the economic and technical considerations that apply when a new LEC provides local switching and transport.<sup>55</sup> Ameritech will not repeat Sprint's analysis here, except to agree that it is "illogical to treat the CLEC's switch as both a tandem switch and an end-office switch, when in fact only one switching function is performed, and to treat some or all of the CLEC's loop plant as 'transport' when all plant behind the last

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<sup>54</sup>(...continued)

covered by an MFS switch, it should be allowed to include areas that MFS only serves through resale of the incumbent's unbundled network elements. MFS Petition at 27. MFS seeks to further expand the subsidy by receiving symmetrical tandem compensation "if it demonstrates that its switch will be capable of terminating traffic over a geographic area substantially larger than that served by the incumbent's *end offices*, whether through its own facilities or through use of unbundled network elements of the incumbent LEC." *Id.* This proposal takes MFS' uneconomic tandem switching subsidy plan, and stretches it to even more absurd lengths.

<sup>55</sup> Sprint Petition at 11-14.

point of switching for the incumbent LEC is considered loop plant and excluded from the ILEC's compensation for transport and termination."<sup>56</sup>

#### **IV. The Commission Should Not Expand the Collocation Requirement Beyond the Mandate of the Statute**

Various parties seek to have the Commission reconsider and expand the types of equipment incumbent LECs must provide through collocation. However, these requests should be rejected. Claims for the addition of other types of equipment to the "collocation list" must always be viewed through the screen of the Commission's authority. The 1934 Act, prior to its 1996 modification, conferred no authority on the Commission to order physical collocation.<sup>57</sup> The new § 251(c)(6) gives the Commission authority to require that incumbent LECs provide for physical collocation of "equipment necessary for interconnection or access to unbundled network elements". If such interconnection can be achieved through equipment that does not possess switching capabilities, there is nothing in the statute that would indicate the incumbent LECs can be required to permit collocation of equipment that performs switching functions.

Moreover, acceptance of these proposals would inevitably put the Commission on a slippery slope requiring it to examine equipment functions and space availability issues. incumbent LEC physical collocation space is a limited commodity. The more functions the Commission recognizes as suitable for collocation, the more equipment will be required.

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<sup>56</sup> Id. at 13.

<sup>57</sup> Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

AT&T, for example, argues that the Commission should require incumbent LECs to permit collocation of remote switch modules and optical switching modules (collectively "RSMs").<sup>58</sup> AT&T further argues that switching by any collocated RSM would only be performed to complete calls between two customers served by unbundled local loops provided through the same incumbent LEC office. This seems hardly likely, given that AT&T or others will undoubtedly want to take advantage of their ability to crossconnect to other interconnectors collocated in the same office.

Similarly, MFS asks the Commission to require incumbent LECs to permit collocation of packet switching equipment.<sup>59</sup> That equipment, however, could easily require up to twice as much space as the transmission equipment actually necessary for interconnection. To the extent that carriers are permitted to collocate more equipment than is required for interconnection purposes, less space will be available for competitors to use for interconnection and access to unbundled elements, the specific purposes contemplated by Congress when it enacted § 251(c)(6). In short, these requests to expand the collocation requirement beyond the bounds of § 251(c)(6) lack a legal basis, raise substantial practical problems, and should be rejected.

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<sup>58</sup> AT&T Petition at 31-34. AT&T argues that RSMs "bridge the gap between switching and transmission equipment."

<sup>59</sup> MFS Petition at 11-13. [We are investigating whether packed switches take up more space than does transmission equipment].

## **V. The Commission Should Not Interfere With Existing Contracts in Competitive Markets**

ALTS argues, for the first time in this Docket, that the Commission should institute a rule allowing the local exchange retail customers of incumbent LECs to abrogate their existing local retail contracts.<sup>60</sup> ALTS's untimely proposal should be rejected for several reasons.

First, ALTS' only justification for a "fresh look" is speculation that "incumbent LECs have been aggressively pursuing long term contracts with their customers." However, there is no showing that this activity is actually occurring or that it is anything more than normal competitive activity in a marketplace that is already competitive. Further, ALTS does not allege any wrongdoing by any incumbent LEC that justifies impairment of existing contracts, nor does it provide any indication that the customers involved are unsophisticated or are being misled.<sup>61</sup>

ALTS focuses in part on allegations regarding Ameritech's actions in Indiana. However, ALTS is mistaken on its facts. Competitors are not locked out as a result of Ameritech Indiana's Centrex contracts. These contracts are assignable, and thus a customer may switch to a reseller without incurring a termination charge by having the reseller assume the outstanding term of the contract. Moreover, the increase in monthly Centrex rates was necessary to maintain a proper balance between Centrex and basic business exchange rates,

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<sup>60</sup> ALTS Petition at 12-14.

<sup>61</sup> Id. at 12 and n.3. ALTS merely cites a statement in Telecommunications Report from one RBOC employee that it is seeking long-term contracts with large customers.

which have been maintained at artificially high levels in Indiana in order to provide a source of funding to support universal service. This issue is now pending before the Indiana Utility Regulatory Commission ("IURC").<sup>62</sup>

ALTS further incorrectly compares local retail contracts with the long term special access contracts for which the Commission did require a "fresh look" in the Expanded Interconnection proceeding.<sup>63</sup> However, unlike special access prior to Expanded Interconnection, the retail services involved here -- which are predominantly Centrex, private line and toll -- are already competitive.<sup>64</sup> These contracts were fairly won by the incumbent LECs in a competitive marketplace, and the fact that new competitors are entering another market -- the basic local exchange marketplace -- does not justify voiding these existing service arrangements.

Moreover, as the Commission correctly noted in rejecting the proposal that it require a re-negotiation of interconnection agreements (§ 170), the issue of re-negotiation is a local issue that is best addressed by the state commissions based upon the specific circumstances of each agreement. In fact, here the case for state review is very strong, since the contracts at issue are for intrastate local exchange services. Similarly, any allegations of misconduct that would support rescission of a contract must be case specific and should be reviewed by state

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<sup>62</sup> In the Matter of an Investigation into Certain Charges Offered by Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana, Case No. 40612.

<sup>63</sup> ALTS Petition at 13.

<sup>64</sup> Ameritech does not offer contracts for its basic local business or residential services.

commissions on a case-by-case basis. In fact, similar allegations have already been litigated and rejected at the state level.<sup>65</sup>

Since the contracts involved are for intrastate and exchange services, there is also significant doubt regarding the Commission's authority to impose a "fresh look" on intrastate local exchange contracts. Section 2(b) of the Communications Act of 1934 still restricts the Commission's jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service . . . " to areas where it is specifically granted authority by Congress to act. In this case, there is no language in the Telecommunications Act of 1996 that demonstrates any intent to impose a "fresh look" requirement on pre-existing intrastate local exchange and toll contracts, or that even purports to give the Commission the jurisdiction to do so.<sup>66</sup>

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<sup>65</sup> For example, MFS raised a claim for fresh look in 1995 in Ameritech's Customers First Plan Docket before the ICC. After a contested proceeding, the ICC rejected MFS' claim because of an absence of evidence that the contracts were entered into for anti-competitive purposes and because many of the services are competitive (Order released April 7, 1995 at ¶ 123). The Michigan Public Service Commission ("MPSC") also rejected a request for a "fresh look" as to all Centrex contracts in 1995. (MPSC Case No. U-10647, released February 23, 1995, at pgs. 077-80).

<sup>66</sup> There is certainly not the types of unambiguous or straightforward grant of authority to the Commission required by the Supreme Court in Conisance Pub. Serv. Com'n v. FCC, 476 U.S. 355, 1377 (1986). To the extent that the Act grants any regulatory body right to re-examine existing contracts, it grants that authority only to state commissions under § 252(e).

## VI. The Commission's Treatment of Promotional Offerings Was Correct

Several petitioners request that the Commission reconsider its treatment of promotional offerings and conclude that they are retail rates to which the resale provisions of § 252(d)(3) must apply.<sup>67</sup> The Commission noted in its *First Report and Order* that although the language of the Act states that wholesale rates should be based on retail rates, there is no definition in the Act for a retail rate. In crafting a regulatory definition of the term, the Commission correctly found that the procompetitive benefit of allowing a limited exclusion for promotions was consistent with the spirit of the Act and outweighed any potential anticompetitive effects. (¶949) The Illinois Commerce Commission reached a similar result, when it concluded that "promotional offerings are a retail cost of competing in the market."<sup>68</sup> The ICC further concluded that a "contrary result would discourage the offering of such limited time promotions and service packages by LECs, discourage competition, and chill the offering of such limited time promotions and service packages."<sup>69</sup> Ameritech also believes that an obligation to resell promotions at either a wholesale rate or retail rate would produce the detrimental effects identified in the ICC final order.

In many promotions, services or aspects of service, such as non-recurring charges, are offered at "no charge" for a brief period of time to both stimulate demand for retail ser-

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<sup>67</sup> AT&T and MCI claim that the Commission essentially contradicted itself by finding that short-term promotional prices do not constitute retail rates, (¶ 949) while declining to create a general exemption from the wholesale requirement for all promotional or discount services. MCI Petition at 8-9; AT&T Petition at 29-30.

<sup>68</sup> Illinois Wholesale Pricing, Docket Nos. 95-0458/95-0531 at 37.

<sup>69</sup> Id.

vices and entice new customers. Such a practice is common in the local exchange and long distance industries, as well as numerous others. The imposition of a resale obligation, whether retail or wholesale, will remove any incentive to offer such promotions. Clearly, such an anticompetitive result was not intended by Congress.

AT&T incorrectly argues that the exclusion of a resale obligation for short term promotions will "obviously prevent resellers from offering similar discounts."<sup>70</sup> AT&T's argument is disingenuous. It is extremely unlikely that any new market entrant would base its marketing tactics, pricing and promotions only on mirroring the incumbent's rates. In fact, AT&T's own actions demonstrate that this is not the case. As AT&T has begun providing competing intraLATA toll service in numerous markets nationwide, its initial market entry has frequently been accompanied by a three month free service promotion even though AT&T has not been receiving any special promotional intrastate switch access discount it obtains from the incumbent LEC and uses to provide the service.

MCI states that additional restrictions are necessary if promotions are not required. MCI's position is that only one promotion can be offered in a calendar year for each underlying service. Again, such a restriction would reduce the number of promotions that are currently offered for many services and would be counterproductive to the pro-competitive goals of both the Act and the *First Report and Order*. The current restrictions adequately prevent incumbent LECs from constructing promotions to avoid resale obligations, and at the same time provide state regulatory bodies with the necessary tools to monitor promotional

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<sup>70</sup> AT&T Petition at 29-31.



filings, without impairing effective competition. There is no reason for the Commission to modify its existing rule.

**VII. The Commission Should Confirm That Paging Providers Are Entitled to Compensation for Terminating Calls That Reflects Their Costs**

Several paging service providers attack the Commission's conclusion that the nature of paging services and the configuration of the equipment and facilities used to provide such services do not support symmetrical mutual compensation from LECs for termination of traffic to their paging customers.<sup>71</sup> In its *First Report and Order*, the Commission authorized symmetrical compensation for cellular carriers, but declined to extend this requirement to paging companies until it concludes further proceedings. Explicitly citing "the lack of information in the record concerning paging providers' costs to terminate local traffic," the Commission noted that "[t]here are no such estimates with respect to paging in the record," and directed that "[t]he paging provider seeking termination fees must prove to the state commission the costs of terminating local calls." (¶ 1093)

Although the Commission told paging providers precisely what record evidence was lacking, petitioners again come up empty. They merely complain that they are treated differently from cellular carriers, and that they will be somehow placed at an unfair disadvantage.

The Commission was correct in finding the network components and resulting costs structures of cellular carriers are not comparable to those of wireline providers. None of the petitioners submits any form of cost data, much less prove that paging providers' costs for

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<sup>71</sup> Comments of Arch Communications, at 6-8; Comments of Airtouch Paging, at 13-25; Comments of Paging Network, Inc. at 12-17.

"terminating" traffic are equal to those that incumbent LECs or cellular carriers incur to terminate a call on their networks. Rather, petitioners merely make bald assertions that "their network architecture . . . is similar to, and just as complex or more complex than those of other CMRS providers,"<sup>72</sup> and that "paging companies obviously incur costs in connection with the completion of calls originated on LEC networks."<sup>73</sup>

Anyone with even a passing knowledge of network architecture knows that there are significant differences between broadcasting and terminating a two-way call to a particular wireline or cellular customer and broadcasting a radio signal across a broad geographic area. It is beyond rational dispute that paging providers, using powerful one-way broadcast transmitters -- each covering a large geographic service area, and arrayed in configurations designed to provide regional or national coverage -- perform no "termination" functions even remotely comparable to the routing, physical switching, and facilities-based call completion functions routinely performed by providers of two-way voice services. Even the paging providers' rudimentary stick-figure diagrams confirm the Commission's finding that "(p)aging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities." (¶ 1092)

The paging providers have yet to provide any supporting evidence whatsoever for their cost claims, and they have given the Commission no basis on which to reconsider its

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<sup>72</sup> Airtouch Paging Petition at 17 (emphasis in original).

<sup>73</sup> Arch Communications Petition at 8.

action in this area.<sup>74</sup> The proper audience for paging providers' alleged cost justification for compensating them for terminating traffic is the state commissions, as is made clear by the Commission's finding that "[t]he paging provider seeking termination fees must prove to the state commission the costs of terminating local calls." (§ 1093)

### **VIII. The Act Does not Require Incumbent LECs to Provide Access to the Rooftops As Right-of-Way**

WinStar requests that the Commission clarify that a utility, including an incumbent LEC, must provide cost-based access to rooftops and riser conduits in buildings the utility owns or controls for a new LEC's microwave equipment and facilities.<sup>75</sup> WinStar asserts that the rooftops are "the true bottlenecks which impede wireless carriers' entry into local markets" and that access is warranted as "right-of-way" under 47 U.S.C. § 224.<sup>76</sup> The

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<sup>74</sup> Even assuming, arguendo, that materials such as the network diagrams submitted by PageNet (Attachment A) and Airtouch (Exhibits 1-8, apparently exact copies of PageNet's materials) were of sufficient quality to be regarded as "facts which have not previously been presented to the Commission" (see 47 C.F.R. § 1.429(b)), these parties' petitions could not be granted. This is because such a petition can only be granted if the facts relied on "relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission", "were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of reasonable diligence have learned of the facts in question prior to such opportunity", or "(t)he Commission determines that consideration of the facts relied on is required in the public interest." (47 C.F.R. § 1.429(b)(1)-(3)). None of these grounds--including the "public interest" argument, the applicability of which is dubious in light of petitioners' continued refusal to provide the cost data requested by the Commission--has been advanced by these petitioners. Thus, no relief can be granted.

<sup>75</sup> Winstar Petition at 3-9.

<sup>76</sup> Id. at 6-7.

Commission declined to adopt this request in the *First Report and Order* because rooftops are not a right-of-way, and WinStar presents no new evidence that changes that conclusion.

Utilities are obligated under § 224(f) to make available poles, ducts, conduits and rights-of-way they own or control for the attachments of cable television systems and telecommunications carriers. "Right-of-way" is not defined in the Act, and what constitutes a "right-of-way" was a matter of great dispute in comments in this Docket. The Commission specifically refrained from adopting an unprecedented and unduly broad interpretation of "right-of-way" that would have included virtually any incumbent LEC property (¶ 1185):

We recognize that an overly broad interpretation of this phrase could impact the owners and managers of small buildings, as well as small LECs by requiring additional resources to effectively control and monitor such rights-of-way located on their properties. We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.

The Commission's interpretation is consistent with the purposes of § 224 and the common meaning of the term "right-of-way." In law, the term refers either to the right to use or pass over property of another, or to that strip of land or other property used or passed over.<sup>77</sup> Under § 224, the only "rights-of-way" a utility must make available to a telecommunications carrier are the "rights-of-way" it owns or controls, that is, its rights to use or pass

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<sup>77</sup> See Joy v. City of St. Louis, 138 U.S. 1, 44 (1890).

over the property of third parties. As the Commission properly recognized the term "rights-of-way" does not include all property owned by the utility, regardless of use.

Further, the Commission correctly recognized that the purpose of § 224 was to ensure that facility-based telecommunications carriers could "piggy back" their networks on the networks of utilities. The greatest difficulty facing a telecommunications carrier proposing to build a new facility-based network is assembling the long, continuous and interconnected rights-of-way necessary to construct such a network. Access to the poles, ducts, conduits and rights-of-way of existing utilities helps to overcome this hurdle. The "rights-of-way" of a utility, understood in this context, are those easements and licenses to use the property of others for network cabling and equipment. This interpretation is fully consistent with the purpose of the original 1978 Pole Attachment Act, which was intended to assist cable television systems in using utility poles to build networks.<sup>78</sup>

WinStar's assertion that incumbent LEC roofs are telecommunications bottlenecks is also absurd on its face. A glance at the roofs of multi-story buildings in any urban or suburban setting demonstrates that rooftop transmitters and receivers are ubiquitous regardless of building ownership. WinStar and others can take advantage of the readily available market for rental of rooftops to place equipment.

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<sup>78</sup> See FCC V. Florida Power Corp., 480 U.S. 245 (1987).

## CONCLUSION

For the reasons set forth above, the Commission should reject each of the petitions for reconsideration or clarification addressed herein.

Respectfully submitted,

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Dated: October 31, 1996

## **CERTIFICATE OF SERVICE**

I, Trent Jones, hereby certify that on this 31st day of October, 1996, I caused a a copy of the foregoing "Opposition of Ameritech to Petitions for Clarification and Reconsideration Filed by Various Parties" to be sent by hand delivery (\*) or by first class mail, postage prepaid, on the parties on the following pages.

  
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